IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SAM SANDIFER **PLAINTIFF**

VS **CIVIL ACTION NO. 3:10-cv-00174-DPJ-FKB**

NORTH BROS. CO., INC., A DIVISION OF NATIONAL SERVICE INDUSTRIES, INC., NOW KNOWN AS PERFORMANCE CONTRACTING, INC.; NATIONAL SERVICE INDUSTRIES, INC.; ENVIRONMENTAL PROTECTION SYSTEMS, INC., A DIVISION OF AND FORMERLY KNOWN AS ENVIRO/ANALYSIS CORP.; MINE SAFETY APPLIANCES, INC.; AVON-INTERNATIONAL SAFETY INSTRUMENTS, INC.; AMERICAN OPTICAL CORPORATION; MISSISSIPPI RUBBER & SPECIALTY COMPANY; JOHN DOE DEFENDANTS 1-500; AND JOHN DOE CORPORATE DEFENDANTS 1-500 **DEFENDANTS**

DEFENDANT AVON-INTERNATIONAL SAFETY INSTRUMENTS, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

Defendant Avon-International Safety Instruments, Inc. ("Avon"), by and through counsel, files this Response in Opposition to Plaintiff's Motion to Remand and in support thereof states as follows:

1. This action arises out of Plaintiff Sam Sandifer's allegations that he was exposed to, and injured by, asbestos-containing products during his employment as a "driver, operator, and firefighter, with the City of Jackson Fire Department at various station locations throughout the City of Jackson, Mississippi, from 1985 through 2007." (Compl. ¶ 15.)

2. The only Mississippi resident defendant in this case is Mississippi Rubber & Specialty Company ("Mississippi Rubber") and, under the facts alleged in the Complaint, Plaintiff has stated no possibility of recovery against Mississippi Rubber as a matter of law. Therefore, on March 22, 2010, Avon timely removed this action to federal court, alleging that

Mississippi Rubber has been fraudulently joined in this case for the purpose of defeating federal jurisdiction, as diversity of citizenship exists between Plaintiff and all other served and properly joined Defendants.

3. On April 21, 2010, Plaintiff filed a motion to remand this case back to state court, alleging that he has properly asserted a viable claim against Mississippi Rubber. For the following reasons, discussed in more detail in Avon's separate supporting memorandum brief, Plaintiff's Motion to Remand is without merit and should be denied.

4. To begin, Plaintiff's fraudulent joinder of Mississippi Rubber is evident for two reasons: First, there is absolutely no evidence that Mississippi Rubber supplied ***any*** asbestos-containing products to the City of Jackson fire stations during the exposure period alleged by Paintiff, or at such times as would have led to exposure by Plaintiff; therefore, there is no possibility that Mississippi Rubber could be liable for the injuries alleged in Plaintiff's Complaint. Furthermore, even assuming for the sake of argument that Mississippi Rubber did supply asbestos-containing products to the City of Jackson fire stations during the requisite exposure period, Mississippi Rubber is still immune from liability pursuant to the innocent seller defense of the Mississippi Products Liability Act. Plaintiff has notably failed to produce any evidence whatsoever to rebut either of these fraudulent joinder arguments.

5. Additionally and in the alternative, Plaintiff's claims against Mississippi Rubber and the remaining defendants have been fraudulently *misjoined*. Questions of fraudulent misjoinder in Mississippi are determined by looking to Rule 20 of the Mississippi Rules of Civil Procedure. That Rule mandates that a Plaintiff's claims against each defendant involve common questions of law or fact, and that the claims arise from the same transaction or occurrence. To constitute the same occurrence, there must be a distinct litigable event linking the parties. In

asbestos cases, moreover, a distinct litigable event requires "more than the conclusory allegations of common exposures…" *Ill. Cent. R.R. Co. v. Gregory*, 912 So. 2d 829, 836 (Miss. 2005).

6. Here, Plaintiff has not even asserted an allegation of common exposure. Nor has he alleged or demonstrated any connection between Mississippi Rubber's sale of asbestos-containing materials somewhere in the State of Mississippi at some unidentified time since 1963, and the asbestos abatement that allegedly occurred at the City of Jackson fire stations or Plaintiff's use of respiratory or other safety equipment. As a result, the claims have been fraudulently *misjoined*. Plaintiff's claims against Mississippi Rubber should therefore be severed and remanded, while Plaintiff's claims against all remaining diverse Defendants are properly pending in federal court.

7. Finally, Plaintiff's argument that Avon has failed to secure the consent of all necessary defendants is unfounded. The federal docket indicates that consents to the removal have been filed on behalf of all named defendants except Mississippi Rubber – who has been fraudulently joined, and Environmental Protection Systems, Inc. ("E.P.S.") – for whom a summons was not even issued until May 5, 2010. (See Dkt Nos. [4], [6], [8], [10].) Fifth Circuit law does not require defendants who either have been fraudulently joined, or who have not been served with process, to consent to a Notice of Removal. Thus, the record is clear that all necessary defendants have consented to this removal, which is both substantively and procedurally proper.

8. For all of the foregoing reasons, and for the reasons discussed in Avon's separate Memorandum in Opposition to Plaintiff's Motion to Remand, Avon respectfully submits that Plaintiff's Motion to Remand should be denied.

9. In further support of its Response, Avon attaches and incorporates by reference the following exhibits:

Exhibit A – Complaint;

Exhibit B – Hinds County Circuit Court docket sheet.

WHEREFORE PREMISES CONSIDERED, Avon-International Safety Instruments, Inc. prays that Plaintiff's Motion to Remand be denied.

THIS, the 10th day of May, 2010.

Respectfully submitted,

AVON-INTERNATIONAL SAFETY INSTRUMENTS, INC., DEFENDANT

By Its Attorneys,
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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing using the Court's ECF filing system, which sent electronic notification of such filing to:

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I hereby certify that I have also served a true and correct copy of the foregoing via United States Mail, postage pre-paid, of such filing to:

Environmental Protection Systems, Inc.
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THIS, the 10th day of May, 2010.

/s/ H. Mitchell Cowan
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